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ZEALOTS, VICTIMS AND CAPTIVES: MAINTAINING ADEQUATE PROTECTION OF HUMAN SHIELDS IN CONTEMPORARY INTERNATIONAL HUMANITARIAN LAW

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I. INTRODUCTION

In the wake of the Taliban capturing the city of Kunduz at the end of September 2015, Afghan President Ashraf Ghani gave a televised interview, in which he sought to reassure the population that the Afghan army would soon retake the city. In that interview, Ashraf Ghani highlighted the army's restraint in dealing with the Taliban as a key factor in allowing the city to be captured, adding "[t]he problem is that the treacherous enemy is using civilians as human shield [sic]".¹ Not long before, in the context of the civil conflict raging in Syria in 2012, Human Rights Watch reported that Syrian government forces had repeatedly utilized human shields by forcing civilians to march in front of the army during arrest operations, troop movements and even military operations in northern Syria.²

The use of human shields is prohibited in all types of armed conflict under both treaty and customary international law.³ The United Nations Security

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¹ J. Goldstein & M. Mashal, "Afghan Crisis Grows as Push to Retake Kunduz From Taliban Fails", *N.Y. Times*, Sept. 29, 2015, available at <http://www.nytimes.com/2015/09/30/world/asia/afghan-forces-seek-to-regain-kunduz-city-from-taliban.html>.

² "Syria: Local Residents Used as Human Shields", *The Worldpost*, May 26, 2012, available at: http://www.huffingtonpost.com/human-rights-watch/syria-local-residents-use_b_1380609.html.

³ For International Armed Conflicts see Art. 28 of the (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 *U.N.T.S.* 287, (1949), and Arts. 51(7) and 58 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977. In regard to Non-International Armed Conflicts, the second Protocol Additional, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, does not specifically mention the use of human shields, *but see* Art. 13(1) of Protocol II; *see also* "Rule 97 Human Shields", Int'l Comm. of the Red Cross, Customary International Humanitarian Law, (hereafter, "ICRC CIHL"), available at

Council has rightly condemned this practice as a blatant violation of international law.⁴ The legal prohibition on human shielding is crystal clear and undisputed. And yet, in practice, important issues remain unresolved. For instance, the fundamental question of when the (often unavoidable) collocation of military objectives among civilians and civilian installations can be said to amount to prohibited human shielding remains unclear. In other words, how exactly are we to disentangle permissible collocation from other prohibited forms of collocation? And perhaps more crucially, how are we to distinguish permissible collocation from the prohibited use of human shields (which remains particularly repugnant owing to fact that it seeks to manipulate legal protections designed to ensure that civilian lives are protected) in the context of an armed conflict? Moreover, the legal consequences of a party or person unlawfully engaging in this practice remain highly controversial.

Human shielding is not a new or recent phenomenon, but a long-standing practice of warfare. It was prevalent in the American Civil War as well as in the Franco-Prussian war⁵ and was relatively widespread in World War II.⁶ However, rather than being confined to the annals of history, human shielding remains a significant humanitarian challenge today, occurring regularly in a broad range of conflicts, both international and non-international. Prominent examples of the use of human shields in recent years include armed conflicts in Gaza,⁷ Iraq,⁸ Afghanistan,⁹ Liberia,¹⁰ and Somalia¹¹ among many others.

https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule97. In terms of customary international law see Rule 97 ICRC CIHL, *ibid*; see also M. J. Matheson, "Remarks: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention", 2 *Am. U. J. Int'l L. & Pol'y*, 426 (1987).

⁴ See, e.g., S.C. Res. 664, U.N. Doc. S/RES/664 (1999); S.C. Res. 998, U.N. Doc. S/RES/998 (1995); S.C. Res. 1776, U.N. Doc. S/RES/1776 (2007); S.C. Res. 1868, U.N. Doc. S/Res/1868 (2009); S. C. Res. 1943, U.N. Doc. S/Res/1943 (2010); and most recently S.C. Res. 2139, U.N. Doc. S/Res/2139 (2014).

⁵ J. M. Spaight, *War Rights on Land* 466 (1911); W. Winthrop, 2 *Mil. L. & Prec.* 797 (2nd ed., 1920).

⁶ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV): Commentary* 208 (J. Pictet, ed., 1958).

⁷ M. N. Schmitt, *Human Shields in International Humanitarian Law*, 38 *Isr. Y. B. Hum. Rts.* [...] (2008).

⁸ The Secretary-General, *Report: Mission to Inspect Civilian Areas in Iran and Iraq which May have been Subject to Military Attack*, U.N. Doc. S/15834 (June 20, 1983); Letter from Secretary-General to the President of the Islamic Republic of Iran and to the President of the Republic of Iraq, June 29, 1984, U.N. Doc. S/16663 (July 6, 1984). Later, see United Nations General Assembly Condemnation of the Iraqi Use of Human Shields in G.A. Res. 46/134, U.N. Doc. A/RES/46/134 (1991). Subsequently see Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* 67 (2003).

In fact, human shielding is arguably a more pressing issue today than ever before due to the continued erosion of any clear-cut distinction between civilians and the military, and the fact that traditional battlefields are increasingly replaced by hostilities in unclear, urban settings. Human shielding appears to be an endemic feature of asymmetric armed conflicts as militarily inferior groups desperately seek to gain a military advantage over a superior party to an armed conflict.¹² In addition to directly endangering civilians, the issue of human shielding is particularly troubling from a legal point of view since its use turns on its head the very rationale of the humanitarian legal order by cynically exploiting the legal protection afforded to civilians under international humanitarian law.¹³

It is against this background that this article seeks to present an analysis of the modern-day phenomenon of human shielding. To this end, this paper is divided into two main parts. Part 1 focuses on the key defining elements of human shielding and explores the under-researched question of how human shielding, a practice which is strictly prohibited by international humanitarian law, can be distinguished from collocation, which in times of war is often unavoidable and in certain forms not prohibited. Part 1, therefore, entails an enquiry into international humanitarian law rules on collocation generally before examining the more fundamental question of when a particular act of collocation can be said to amount to the war crime of human shielding.¹⁴

⁹ R. Faiez, "Claim: Taliban Used Children as Human Shields", *Associated Press*, September 20, 2007; see also E. Gross, "Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?" 16 *Emory Int'l L. Rev.* 445, 518-519 (2002).

¹⁰ The Secretary-General, *15th Progress Report on the UNOMIL*, U.N. Doc. S/1996/47, para. 24 (Jan. 23, 1996).

¹¹ *Report Pursuant to Paragraph 5 of the Security Council Resolution 837 (1993) on the Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia Conducted on Behalf of the UN Security Council*, U.N. Doc. S/26351 (1993), Annex, paras. 8-9; U.N. Doc. S/26351 (1993); see also Human Rights Watch, *So Much to Fear*, at 28-29, 64-66 (2008), and Human Rights Watch, *Harsh War, Harsh Peace Abuses by al-Shabaab, the Transitional Federal Government, and AMISOM in Somalia*, at 39-40 (2010).

¹² See, e.g., M. N. Schmitt, "Asymmetrical Warfare and International Humanitarian Law", in *International Humanitarian Law Facing New Challenges* 11 (W. Heintschel von Heinegg & V. Epping, eds., 2007).

¹³ To this end Roberts has included the use of human shields within the group of actions that can be classified as 'lawfare', see A. Roberts, "The Civilian in Modern War", *Y. B. Int'l Hum. L.* 50 (2009); see also Schmitt, *supra* note 7 at 57.

¹⁴ See Rule 156 of ICRC CIHL *supra* note 3; ICC Statute Art. 8(b)(xxiii).

Part 2 will then consider the legal consequences that arise from human shielding. Particular attention will be paid to the effect that the use of human shields has on the obligations of the attacked party, *i.e.*, the party illegally using human shields, and the (legal) protections applicable to the civilian population affected by this practice. A pivotal and continuously controversial issue in this regard is whether and under which circumstances human shielding amounts to direct participation in hostilities leading to a temporary loss of civilian protection from direct attack. The issue of direct participation in hostilities of human shields is now often viewed through the lens of the conventional distinction between voluntary and involuntary participation in hostilities. However, the authors argue that this is inadequately nuanced to be a satisfactory prism through which to assess this issue. Consequently, it is crucially important to establish a more satisfactory means of ensuring that involuntary human shields are not deprived of the protection that the law affords them.

II. DISENTANGLING PERMITTED COLLOCATION, PROHIBITED COLLOCATION AND HUMAN SHIELDING

A. Permitted and Prohibited Collocation

In the course of an armed conflict, some form of collocation between military and civilian objects and personnel is in one way or another inevitable. In any given conflict, the military may find itself using civilian infrastructure (such as roads or railways) or it may be necessary for a military convoy to pass through a civilian village. An oft-cited example of collocation in this regard is the retreat of military forces down a road on which civilians are also fleeing hostilities.¹⁵ The laws of armed conflict take this reality into account. Collocation, and in fact even the use of civilian objects for military purposes, are not generally prohibited by the laws of armed conflict, notwithstanding the fact that they may have drastic legal consequences such as turning a civilian object into a military objective for as long as it is so used.¹⁶

Whether a particular situation amounts to permitted or prohibited collocation is important not only with regard to the prior determination of whether a particular military objective may legally be placed in a certain location, but is also critical in determining the legal liability of the party conducting the attack, after the fact. In lieu of a general prohibition on collocation, international humanitarian law imposes a number of important legal constraints on specific forms of collocation. In particular, these

¹⁵ See Schmitt, *supra* note 7 at 26.

¹⁶ Art. 52(2) Additional Protocol I, *supra* note 3.

constraints derive from the obligations laid out in Article 58 of Additional Protocol I, as well as corresponding customary law provisions.¹⁷ Thus, while not prohibiting collocation *per se*, Article 58(b) of Additional Protocol I provides that parties to an armed conflict shall avoid locating military objectives within or near densely populated areas.¹⁸ In addition, Article 58(a) of Additional Protocol I imposes an obligation on parties to remove “the civilian population, individual civilians and civilian objects” from the vicinity of military objectives.¹⁹

There are, however, some important caveats to these stipulations. For instance, Article 58 Additional Protocol I specifically provides that parties to the conflict are only under an obligation to act as described above “to the maximum extent feasible”.²⁰ Furthermore, subsection (a) provides that parties need only ‘endeavour’ to remove civilians and civilian objects ‘under their control’ from the vicinity of military objectives. It follows from the ‘maximum extent feasible’ caveat that parties to an armed conflict are only required to do what can reasonably be expected of them in light of the prevailing circumstances. Similarly, subsection (b) of Article 58 makes specific reference to “densely populated” areas, imposing a higher threshold than merely “populated areas”.²¹ As a consequence, placing military objectives in ‘populated areas’ is not prohibited by Article 58(b) of Additional Protocol I. It can, however, be argued that such a form of collocation is comprised by Article 58(c) of Additional Protocol I, according to which parties to an armed conflict shall “take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”. While this latter provision is broad enough to capture other forms of collocation including the location of military objectives in populated (rather than *densely* populated) areas, it remains subject to the “maximum extent feasible” caveat, which would seem to exclude situations where collocation is inevitable. Moreover, Article 58(c) of Additional Protocol I, by virtue of the wording “take (...) precautions to protect” is formulated as a positive obligation. Parties to an armed conflict are therefore only required to do what can be expected of them under the given circumstances. Moreover, as NATO State parties to Additional Protocol I made clear at the time of ratification, the word feasible in Article 58 of

¹⁷ See *supra* note 3.

¹⁸ Art. 58(b) Additional Protocol I, *ibid.*

¹⁹ Art. 58(a) Additional Protocol I, *ibid.*

²⁰ Art. 58 Additional Protocol I, *ibid.*

²¹ Art. 58(b) Additional Protocol I, *ibid.*; see *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 2247, 2251 (C. Pilloud, Y. Sandoz, C. Swinarski, B. Zimmermann, eds. 1987).

Additional Protocol I is understood “to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time including humanitarian and military considerations”;²² and this view is shared by others today.²³ The various qualifications to Article 58 of Additional Protocol I respond to battlefield realities. They leave States with a certain (necessary) room for manoeuvre, allowing them to collocate military objects and personnel in civilian surroundings even for certain strategic reasons (“military considerations”). However, unlike collocation, which may be prohibited in certain (but not necessarily all) circumstances, human shielding is absolutely prohibited.

B. Prohibited Shielding

The very fact that the prohibition on the use of human shields is one which admits of no exception raises the question as to how to distinguish this phenomenon from other forms of collocation. According to Article 51(7) of Additional Protocol I:

the presence or movements of the civilian population or individual civilians shall not be used *to render* certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians *in order to attempt to shield* military objectives from attacks or to shield military operations.²⁴

As a result of specific textual references to the fact that certain acts must be deliberately carried out for a particular purpose, (specifically “to render” certain areas immune from military operations or “to attempt to shield” military objectives from attack) an element of subjectivity is introduced into the equation. Consequently, in order to distinguish human shielding from

²² See, with some lexical variations, the declarations and reservations made by Germany (14/2/1991), Belgium, (20/5/1986), the United Kingdom, (2/7/2002), Canada (20/11/1990), Italy (27/2/1986) and the Netherlands (26/6/1987), all available at: https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.

²³ See US Department of Defense Law of War Manual, 5.3.3.2. at 189 and 5.11 at 237 (2015), available at: <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>.

²⁴ See Art. 51(7) of Additional Protocol I, *supra* note 3 (emphasis added).

collocation it is a necessary exercise to show that such acts were taken deliberately in order to achieve this end.

A number of potential options exist in this regard, including the use of a strict standard by which any form of collocation of civilians and military objectives would necessarily demonstrate that such acts were taken deliberately in order to shield military objectives. However, any such strict standard cannot be seriously considered. In fact, the same can be said for any suggestion that focussing on any part of the *actus reus* of human shielding alone can be a fruitful basis on which to distinguish it from collocation. This is necessarily the case due to the fact that, as shown above, some forms of collocation are legally tolerated in certain circumstances.

Accordingly, it is easy to see why the attention of most international legal scholars has turned to the *mens rea* or the intent of the party accused of participating in the illegal use of human shielding. It is for this reason that the process of establishing “specific intent” to carry out acts commensurate to human shielding has become the most widely accepted means of distinguishing between collocation and human shielding. This is the case despite the difficulties inherent in drawing such a distinction in armed conflict, especially in the context of wars in cities and other densely populated areas that invariably raise challenging issues such as how to take into account passive shielding, whereby military objectives are placed in the vicinity of civilian surroundings, a point to which we will return below.

Before turning to examine specific intent, it should first be pointed out that human shielding also differs from collocation in another way, namely in that it specifically only relates to persons. Despite the fact that Articles 58(a) and 58(c) of Additional Protocol I refer to the “civilian population, individual civilians and civilian objects”, it remains the case that the prohibition on the use of human shields relates solely to persons. This is the case due to the fact that human shielding is derived from the Third and Fourth Geneva Conventions, which deal with the protection of specific categories of persons (specifically prisoners of war and civilians).²⁵ Similarly, Article 51(7) of Additional Protocol I only refers to the ‘civilian population or individual civilian’ and, therefore, like the corresponding war crime in Article 8(2)(b)(xxiii) of the Rome Statute (‘civilian or protected person’) does not include the use of objects to shield.²⁶ As such, it can be said that the customary prohibition on the use of human shields relates solely to persons,

²⁵ See Rule 97 ICRC CIHL, *supra* note 3.

²⁶ See Art. 8(2)(b)(xxiii) of the Rome Statute of the International Criminal Court, 28 U.N.T.S. 3 (1998) (the “Rome Statute”). *see also* W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 250 (2010).

although “persons” in this context is broad enough to encompass not only civilians, but also other categories of protected persons such as the wounded and sick, or soldiers *hors de combat*.²⁷

This fact distinguishes the prohibition on the use of human shielding from, for example, the proportionality principle, which applies, *mutatis mutandis*, to both persons and civilians objects.²⁸ This distinction derives from the rationale underpinning the prohibition on the use of human shields, namely the protection of human life specifically, and is the reason why intentionally endangering civilian objects by placing them in the vicinity of military objectives does not qualify as “shielding” but may or may not – depending on the circumstances – violate the provision of Article 58 of Additional Protocol I.

C. Establishing Specific Intent to Shield

Returning to the issue of specific intent, generally considered the most appropriate way to distinguish collocation from human shielding, the following subsection sets out to deal with two crucial issues. First, we will consider the difficulty inherent in obtaining evidence and establishing facts in the midst of an armed conflict, and second, the applicable evidentiary standard. It was noted above that the act of establishing this specific intent is in practice a fiendishly difficult undertaking. In an attempt to aid in this endeavour, it is helpful to first of all specify what acts can be said to amount to human shielding and in doing so to distinguish between what we term active and passive forms of human shielding.

As a preliminary matter, it is important to clarify from the outset that whether or not the use of human shields is passive or active, a distinction explained in greater detail below, Article 51(7) of Additional Protocol I of 1977 and customary international law²⁹ outlaws both. The first sentence of Article 51(7) of Additional Protocol I concerns passive human shielding, stating that “[t]he presence or movement of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. [Emphasis added].” Similarly, in relation to the active use of human shields,

²⁷ See Rule 97 of ICRC CIHL *supra* note 3.

²⁸ See Rule 14 ICRC CIHL, *supra* note 3.

²⁹ See Rule 97 of ICRC CIHL *supra* note 3, see also Art. 8(2)(b)(xxiii) Rome Statute, *supra* note 26, which makes clear that the prohibition on the use of human shields only applies when protected persons are moved to the vicinity of military operations, but also when such operations are moved into the vicinity of civilians; see Schabas, *supra* note 26.

the second paragraph of this provision states that “[t]he Parties to the conflict *shall not direct the movement of the civilian population or individual civilians in order to attempt to shield* military objectives from attacks or to shield military operations. [Emphasis added].” As such, in legal terms the distinction between active and passive human shielding seems to be of marginal importance. However, in dealing with an issue in which the specific intent of the party (as interpreted through the *mens rea* element) is crucial, the distinction between passive and active human shielding is centrally important. This is, of course, due to the fact that intent is factually easier to establish in relation to active human shielding than passive, as we will see in the following subsections.

1. Active Human Shielding

Active human shielding refers to those situations in which a party to a conflict for whatever reason purposefully directs – with or without the use of coercion – civilians or other protected persons towards a military objective. A typical example often cited in this regard occurred during Operation Desert Storm in 1990 when Iraq captured a number of foreign citizens for use as human shields and placed them in various locations to protect selected military objectives.³⁰ While such use of human shields where civilians are deliberately directed (and their protection under international humanitarian law is intentionally exploited) by a party to the conflict in order to protect a military objective is particularly blatant, it is only one form of human shielding.

In light of these considerations, some situations inferring specific intent circumstantially will be straightforward in terms of evidence. If civilians are visibly, forcibly moved towards a military base establishing specific intent would not appear to present a significant challenge, especially in the absence of any other plausible explanation. For example, if one hundred civilians have been moved into the desert to surround an ammunition depot, at least *prima facie* there would appear to be no other plausible explanation as to why civilians should be there other than the intent to shield. Scenarios of active human shielding in which specific intent can be inferred circumstantially are perhaps unsurprisingly those which are most often

³⁰ See condemnation of UN Security Council in S.C. Res. 664, U.N. Doc. S/RES/664 (1999); see also “1990: Outrage at Iraqi TV hostage show”, BBC Home, Aug. 23, 1990, available at: http://news.bbc.co.uk/onthisday/hi/dates/stories/august/23/newsid_2512000/2512289.stm.

discussed in military manuals³¹ and are those that have been regularly condemned by the Security Council.³²

2. *Passive Human Shielding*

In contrast, scenarios in which military equipment or personnel is brought into a civilian environment, have received much less attention. Passive shielding is more challenging both in legal and factual terms and occurs when a party to a conflict takes advantage of the pre-existing location of civilians in order to protect its soldiers or military equipment, *i.e.*, when military material is moved into or hidden in civilian areas. In the case of the passive use of human shields, affected civilians may, in fact, have no knowledge that they are being instrumentally used in this way. For instance, a party may move military equipment into the grounds of a hospital or other populated area to seek protection from attack. This occurred, for example, in 2003 during Operation Iraqi Freedom when Iraqi soldiers regularly hid close to civilian houses, thereby using the occupants as shields.³³ In another instance a party to a conflict utilised passive human shields by situating its forces in a refugee camp, thereby seeking to exploit the legal protections afforded to refugees.³⁴

What makes these scenarios so problematic in practice is that military equipment may be found in a civilian neighbourhood for a wide variety of permissible or impermissible reasons. This brings the distinction of lawful forms of collocation and unlawful shielding, and the difficulty of establishing intent, to the forefront. The mere fact that military equipment is located within a civilian environment does not necessarily mean that a specific intent to shield can be inferred circumstantially as is often the case in scenarios of active human shielding. In fact, there may be a number of reasons why military equipment is located in or moved into a civilian neighbourhood such as the necessity of gaining access to water or food

³¹ See, e.g., US Department of Defense, *Law of War Manual*, *supra* note 23, sec. 5.16 at 258, and UK Ministry of Defense, *The Joint Service Manual of the Law of Armed Conflict*, sec. 5.22 at 67 (2004), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP_3832004Edition.pdf

³² See S.C. Res. 664, U.N. Doc. S/RES/664 (1999); U.N. S.C. Res. 998, U.N. Doc. S/RES/998 (1995); S.C. Res. 1776, U.N. Doc. S/RES/1776 (2007); S.C. Res. 1868, U.N. Doc. S/Res/1868 (23 March 2009); S. C. Res. 1943, U.N. Doc. S/Res/1943 (13 October 2010) and S.C. Res. 2139, U.N. Doc. S/Res 2139 (2014).

³³ See Schmitt, *supra* note 7 at 19, and Human Rights Watch, *supra* note 8 at 67.

³⁴ See The Secretary-General, *Report Prepared Pursuant to General Assembly Resolution ES-10/10*, U.N. Doc. A/ES-10/186 (2002).

supplies in the area, a retreat down the same road used by civilians, or other compelling strategic reasons.³⁵

Given the evidentiary difficulties in establishing specific intent to shield, the authors argue that an overly restrictive approach to these requirements cannot be justified. That, of course, is not to say that it will never be possible to establish specific intent to shield circumstantially in passive human shielding scenarios.³⁶ For example, if hostilities are found to be occurring in a populated area, and military equipment is subsequently moved closer to those areas that are most densely populated, or military equipment is moved to the proximity of a civilian installation where it is known that the negative publicity of a future attack would be the highest, then it might be possible to infer specific intent to shield from these particular circumstances.

Clearly, no particular evidentiary challenges arise if the intent to shield is officially proclaimed.³⁷ And, indeed, the specific intent to use civilians as shields has been admitted on occasion; for example, by Hamas with some officials admitting “openly and explicitly that their intention is to use the civilian population in Gaza in order to shield their rockets and operatives” although it must be said that such practice is the exception rather than the rule.³⁸

Ultimately, how specific intent to shield is established remains a challenging issue open to interpretation. In light of this, it is more plausible to argue that the intent to discourage an attack (without necessarily intending to render the target immune in a legal sense) by maximising the civilian costs ought to be considered sufficient to meet the requirements of specific

³⁵ M. N. Schmitt, “Human Shields in International Humanitarian Law”, 47 *Colum. J. Transnat’l L.*, 303 (2008-2009), which gives the example of Yugoslav troops transporting military equipment in convoys with displaced persons; see also OSCE, *Kosovo/Kosova: As Seen, As Told: An Analysis of the Human Rights Findings of the Kosovo Verification Mission: Oct. 1998 to June 1999* (1999).

³⁶ S. Bouchié de Belle, “Chained to Canons or Wearing Targets on Their T-shirts: Human Shields in International Humanitarian Law”, 90 *Int’l Rev. Red Cross* 889, (2008).

³⁷ In this sense a parallel can be drawn with Art. 11 of the ILC’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts, A/56/10 (2001), which states that “Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.”

³⁸ See, e.g., statement made by Hamas’s Interior Minister, available at: <http://in.reuters.com/article/us-palestinians-israel-idINKBN0FI0WW20140713>; T. Kolesov Har-Oz & O. Pomson “The Use of Human Shields and International Criminal Law”, Guest Post, *Opinio Juris*, (2014), available at: <http://opiniojuris.org/2014/08/01/guest-post-use-human-shields-international-criminal-law/>.

intent.³⁹ By the same token, intent to render a military object immune from attack, or even the actual result of achieving legal immunity due to a manipulation of the proportionality principle, is not required.

This result is perfectly in line with the underlying rationale of the prohibition of human shielding. After all, the prohibition is not merely to be understood as a back-up prohibition that complements the proportionality principle. The rationale underlying the prohibition on the use of human shields, quite plainly, is to ensure that civilian lives are not unnecessarily put in danger in the course of armed conflict irrespective of whether or not such a practice actually affects the proportionality assessment. The very act of utilizing human shields, whether in an active or passive sense, undermines this rationale by putting the lives of those used as shields at risk. As such, whether or not the intent of the party is to render a military objective legally immune from attack (*i.e.*, to achieve a specific legal result) or merely to dissuade another party to a conflict from attacking a particular target, the outcome is the same — putting civilian life in danger. Therefore, the justification for drawing such a distinction founders.

D. A Standard of Proof for Human Shielding

Moreover, in relation to the standard of proof, outside a criminal court it would go too far to require that specific intent to shield be established beyond any reasonable doubt. Instead, clear and convincing evidence of this specific intent will suffice to prove that a party to an armed conflict has engaged in the prohibited practice of human shielding. In making assessments on a case-by-case basis, owing to the evidentiary challenges associated with the establishment of specific intent, mere intent to discourage an attack rather than intent to render a target legally immune ought to be enough to prove specific intent in the sense of human shielding and prohibited collocation.

In cases where human shielding can be shown to have occurred, important questions arise as to the legal consequences for the party engaging in human shielding, the attacker confronted with shielded military objectives as well as, most importantly, the civilians who are actively or passively involved in the shielding activity. It is these important questions which are examined below.

III. THE LEGAL CONSEQUENCES OF HUMAN SHIELDING

³⁹ See US Department of Defense Law of War Manual, *supra* note 23 at 5.16.2, which states that “[t]he essence of this rule is . . . the purpose of deterring enemy military operations”.

Turning first to the party engaging in shielding, the legal consequences are relatively clear. As stated above, the use of human shields is a breach of international humanitarian treaty and customary international law.⁴⁰ In the context of an international armed conflict, the other party may respond to such a violation of the laws of armed conflict in a classical way, namely by resorting to belligerent reprisals, although these are, it should be noted, subject to strict constraints.⁴¹ Furthermore, the individual commander responsible for the act of using human shields in an international armed conflict may be responsible for committing a war crime.⁴²

Much more important, and more challenging, is the question of whether and how prohibited shielding by one party to the conflict affects the other side's (*i.e.*, the attacker's) obligations. It is almost trite to state that the legal consequences for the attacker go hand-in-hand with the legal consequences for the civilian population. If the legal obligations of the attacker were somehow mitigated, the legal protection of the civilian population would likewise be diminished. Against this background, it is important to clarify that the practice of human shielding in and of itself does not have any direct impact on the attacker's legal obligations.

On the contrary, Article 51(8) states that the protections of the civilian population are not to be lowered solely because one side is violating its obligations under the law of armed conflict.⁴³ Consequently, the mere fact that one party to the conflict is utilising human shields in our view does not – as such – directly change anything for the attacker. Of course, the presence of higher numbers of civilians will factually influence the outcome of the proportionality assessment and may indeed tilt the balance in a way that would prohibit the attacker from proceeding with the attack. Human shielding – unless it actually amounts to a direct participation in hostilities on behalf of the respective individuals involved – does not diminish the legal protection of the civilians involved. Of course, it should be noted that the

⁴⁰ See *supra* notes 1 and 2.

⁴¹ Although such belligerent reprisals can never be made against protected persons, see Rules 145 and 146 of the ICRC CIHL *supra* note 3 in particular; see also API Art. 52(1).

⁴² See Art. 8(2)(b)(xxiii) Rome Statute, *supra* note 26, at Art. 58(b) Additional Protocol I; In Non-International Armed Conflicts, Additional Protocol II does not specifically mention the use of human shields; but see Art. 13(1) of Additional Protocol II, *supra* note 3.

⁴³ *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, Adopted by the Assembly of the International Committee of the Red Cross, 90 *Int'l Comm. Red Cross* 872 (2009); see also Art. 51(8) Additional Protocol I, *supra* note 3, which states that “[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57”.

UK takes the view that even though involuntary human shields do not directly participate in hostilities “the enemy’s unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected”.⁴⁴ According to this view, the proportionality principle remains relevant, but “if the defenders put civilians or civilian objects at risk . . . , this is a factor to be taken into account in favour of the attackers in considering the legality of attacks”.⁴⁵ It is not fully clear or explained on what legal reasoning the argument in the UK LOAC Manual is based. The US Department of Defense Law of War Manual goes further, arguing that harm to human shields whose activities do not amount to a direct participation in hostilities “would be understood not to prohibit attacks under the proportionality rule”.⁴⁶ The US Department of Defense Law of War Manual explains that “if the proportionality rule were interpreted to permit the use of human shields to prohibit attacks, such an interpretation would perversely encourage the use of human shields and allow violations by the defending force to increase the legal obligation on the attacking force.”⁴⁷ The rationale underlying these views, namely that illegal activities should not yield any strategic advantage for the enemy, is of course plausible and finds support in the literature.⁴⁸ The crux of human shielding is that it does, in fact, produce a strategic advantage⁴⁹ and the disincentives included in the law, such as the sanctioning of human shielding as a war crime, only apply in international armed conflicts and may not always be sufficiently strong. Accordingly, closing the gap and also sanctioning human shielding as a war crime in non-international armed conflicts is certainly highly desirable.

The problem is that alternative solutions often proposed typically increase the risk for the civilian population by lowering their legal protection, and, in our view, have no basis in international law as it currently stands. Customary international law prohibits reprisals directed against civilians and the mere fact that a party engaging in human shielding violates international law cannot justify a loss or lowering of the legal protection of the civilians involved.⁵⁰ The UK’s reservation to Article 51 of Additional Protocol I only refers to cases in which “an adverse party makes serious and deliberate

⁴⁴ UK LOAC Manual, *supra* note 31, at 5.22.1.

⁴⁵ *Id.*, at 2.7.2.

⁴⁶ US Department of Defense Law of War Manual, *supra* note 23, at 5.12.3.

⁴⁷ *Ibid.*

⁴⁸ See A. Rubinstein & Y. Ronzai, “Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality”, 22 *Stan. L. & Pol’y Rev.*, 93, 103 *et seq.* (2011).

⁴⁹ It should be noted, however, that reliable statistics as to how often human shielding has actually deterred an attack are not available.

⁵⁰ See ICRC CIHL, *supra* note 3, at Rule 145 *et seq.* with regard to reprisals.

*attacks, ... against the civilian population or civilians,*⁵¹ and therefore does not encompass the use of human shields. Civilians, in turn, only lose protection if their activity fulfils the specific criteria of direct participation in hostilities. While the exact interpretation of these criteria remains controversial, arguing that involuntary human shields who are not directly participating in hostilities forfeit their protection under the proportionality rule creates a sub-category of “directly participating in hostilities-light” and introduces complicated distinctions between civilians who count for purposes of the proportionality principle and civilians who do not, and also between the loss of protection from direct attack (through direct participation in hostilities) and the loss of protection from indirect attack (‘shielding’), which adds further complexity to the application of the law in practice and has no basis in international humanitarian law.

However, there is a more indirect way in which the attacker’s obligations could be affected, namely if the focus is shifted from the party making use of human shields to the individual civilians involved in this practice with regard to the issue of direct participation in hostilities. In other words, when determining the legal obligations of the attacker, what matters is not whether human shielding occurs, but whether the civilians involved in the shielding activity are directly participating in hostilities thereby temporarily losing their protection from direct attack.

A. Human Shields and Direct Participation in Hostilities

Under Article 51(3) of Additional Protocol I “civilians shall enjoy the protection afforded by this section unless and for such time as they take a direct part in hostilities.” Consequently, if the civilians who are engaging in human shielding were considered to be directly participating in the hostilities they would (temporarily) lose their protection from attack. And, indeed, there is, in fact, widespread agreement that shielding activities can, in principle, amount to direct participation in hostilities leading to a loss of protection.⁵² However, the devil, as always, is in the details. It is highly controversial under what particular conditions shielding activities would

⁵¹See the UK Reservation, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2> (emphasis added).

⁵² See the general agreement on this issue acknowledged in *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, *supra* note 43 at 1024.

amount to a direct participation in hostilities, and it is this issue upon which this portion of the article attempts to shed some light.

According to the ICRC's Interpretive Guidance whether an act of human shielding qualifies as direct participation in hostilities depends on exactly the same criteria as would apply to any other activity.⁵³ These guidelines, while not universally accepted without criticism,⁵⁴ are crucially important at a time when the traditional binary distinction between combatant and civilian seems increasingly like an esoteric abstraction. Many modern conflicts take place in cities and are asymmetrical in nature – posing many problems to traditional international humanitarian law. As such, efforts to clarify how the new realities can be dealt with under the law are a necessary exercise. In practice, however, this is decidedly complicated and the issue of when human shielding activities can amount to direct participation in hostilities is especially controversial.⁵⁵

B. Voluntary and Involuntary Human Shielding: Suitable Categories to Establish Direct Participation in Hostilities?

The debate surrounding direct participation in hostilities is well-rehearsed and as such it is not the aim of this article to restate what has already been said elsewhere. Drawing on this debate, however, it can be said that a not uncontroversial, but widely held position is that a distinction ought to be made between whether the act of human shielding was carried out voluntarily or involuntarily. The following subsection will set out why this distinction is an insufficiently sophisticated lens through which to establish direct participation in hostilities.

As stated above, a number of commentators have argued that voluntary engagement in shielding activities can (and should) lead to loss of protection for civilians under international humanitarian law.⁵⁶ For example, Schmitt

⁵³ *Id.*

⁵⁴ See, e.g., M. N. Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements", 42 N. Y. J. L. & Pol., 697 (2009-10), B. Boothby, "And for Such Time As": The Time Dimension to Direct Participation in Hostilities", 42 N. Y. J. L. & Pol., 741 (2009-10), W. H. Parks, "Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect", 770, Watkin, K. Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance", 42 N. Y. J. L. & Pol., 641 (2009-10).

⁵⁵ J. Quéguiner, "Precautions Under the Law Governing the Conduct of Hostilities", 88 *Int'l Rev. Red Cross* 815-817 (2006).

⁵⁶ A. Rubinstein, & Y. Ronzai, *supra* note 48; K. Dronova, *Human Shields: Standard of Protection Under International Human Rights Law and International Humanitarian Law*, LLM Thesis, Central European University, on file with the author, at 84.

has argued that since '[a] voluntary shield takes affirmative steps to frustrate harm to objects (or persons) that make such a contribution...he contributes to military action in a direct causal way; it is difficult to style his behaviour as anything but direct participation.'⁵⁷

Similarly, the Israeli Supreme Court in its 'Targeted Killings' judgment stated that:

Certainly, if [human shields] are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in hostilities.⁵⁸

Commentators who support this position typically distinguish voluntary shields from civilians who are forced to act as shields against their will and thus continue to enjoy immunity from attack. This is undoubtedly a plausible position, particularly in the abstract, as the notion of voluntary human shields fulfilling the constitutive criteria for a direct participation in hostilities by, for instance, obstructing an attack, is not in fact far-fetched. However, strictly speaking, this view adds a new subjective element to the list of objective constitutive elements that – at least according to the ICRC's Interpretive Guidance – define direct participation in hostilities. Indeed, on the basis of these criteria – namely the threshold of harm, direct causation and belligerent nexus, whether an activity fulfilling these criteria occurred voluntarily or involuntarily, due to coercion, for example is not necessarily determinative. Rather, what appears to be more important is whether these criteria are fulfilled or not, in particular whether the shielding activity in question meets the relevant threshold of harm, or, in other words, whether it indeed adversely affects the enemy's military capabilities. Therefore, strictly applied, these criteria could arguably also render a person involuntarily acting as a human shield as a person directly participating in hostilities.⁵⁹

⁵⁷ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 181-6 (3rd ed., 2016); see also Schmitt, *supra* note 7 at 41.

⁵⁸ HCJ 796/02, *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, para. 18 (2006), 46 *I.L.M.* 375, para. 36 (2007).

⁵⁹ N. Melzer, "Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities" 42 *Int'l L. & Pol.* 831, 870 (2010).

Of course, one must bear in mind that the constitutive elements developed by the non-binding ICRC Interpretive Guidance, although they are, unlike the study as a whole, widely accepted and relatively uncontroversial, they are not written in stone. From a purely legal perspective, therefore, there is no compelling reason why the criteria defining direct participation in hostilities could not also include an additional subjective element whereby only voluntary acts would qualify as a direct participation in hostilities. However, viewed in light of the realities of modern warfare, there are a number of practical reasons that render any such subjective element impracticable.

While clear-cut scenarios where the intention of a voluntary shield can be straightforwardly established may hypothetically be feasible, in reality (and in the heat of the battlefield) clear distinctions between persons shielding voluntarily or involuntarily are impracticable in the context of an armed conflict. In fact, even those who support the voluntary/involuntary distinction concede that this may often be the case.⁶⁰ As Melzer has stated, while there may be extreme cases of vociferous individuals volunteering to act as shields or victims forced against their will, the “vast majority of situations involving human shields...are likely to fall into a grey-zone full of intricate questions no military commander or soldier should be expected to resolve”.⁶¹ The theoretical distinction between civilians voluntarily and involuntarily acting as human shields hinges entirely on the mental element (the *mens rea* of that particular individual). This state of mind would need to be established individually for each and every one of the civilians involved in the shielding activity in order to prove that a person acting as a human shield was doing so voluntarily and as a result could be considered to be directly participating in hostilities.⁶²

Furthermore, the difficulty that drawing a distinction between voluntary and involuntary human shielding entails is particularly manifest in situations where military objectives are deliberately moved into a civilian area and where civilians are passively manipulated (*i.e.*, where they play no active part) in order for a party to the conflict to exploit the protection they enjoy under the law. In such scenarios, the civilian population may not even be aware of the fact that military equipment is being moved into their neighbourhood. Furthermore, even if the civilian population was fully aware

⁶⁰ Schmitt, *supra* note 7 at 27, stating that “[o]bviously, intent can prove difficult to identify in practice”; see also Quéguiner, *supra* note 55, at 816.

⁶¹ Melzer, *supra* note 59, at 873.

⁶² *Id.* at 44; see also Kolesov Har-Oz, & Pomson, *supra* note 38, stating that “[s]ince the *actus reus* of this crime is rather broad, it seems that great emphasis is placed on the *mens rea*.”

and if, as a result, their presence could be qualified as voluntary, the logical question is what they could possibly be expected to do in such circumstances. The civilian population may passively tolerate this activity and may refuse to leave their homes but it is important to emphasise that people are under no legal obligation to leave their homes in such circumstances.⁶³ Of course, while residing in an area where a party to a conflict is known to conduct military operations will necessarily increase a civilian's factual risk of becoming a victim of an attack, this fact in itself does not diminish his legal protection from attack. In the absence of such a duty to leave their homes it seems inconceivable that passivity could ever be equated with direct participation in hostilities leading to a loss of legal protection.⁶⁴

Rather, the best way to achieve this result is to assess whether – in accordance with the constitutive criteria suggested in the ICRC's Interpretive Guidance – a direct causal link between the presence of a civilian and adverse effects on the attacker's military capabilities can be discerned, taking into account whether it meets the required threshold of harm (see below). Ultimately, in the case of civilians who refuse to leave their homes after military equipment has been moved into their neighbourhood, it is questionable whether this could ever amount to the active conduct required for direct participation in hostilities. In addition, it could be argued that such passivity amounts to an indirect causation of harm that does not qualify as direct participation in hostilities.

Another reason why the voluntary/involuntary distinction is impracticable is that coercion in this context may come in different forms that may often not be readily apparent to an attacker or from a distance. For example, if family members have been taken hostage to compel an individual to act as a human shield or even if there is merely a threat to this effect, in practical terms how could an attacker ever be expected to ascertain such information? In addition, it is unclear where exactly (in times of war) to draw the line between acts that are either voluntary or involuntary, in the sense that it is exceedingly difficult to determine how much free will is indeed required in order for an individual to be considered to be acting voluntarily and how in

⁶³ See Schmitt, *supra* note 35 at 316, stating that '[w]hatever the rationale for their presence, it is only when they refuse to depart because they wish to complicate the enemy's actions that they qualify as voluntary shields.' See also Bouchié de Belle, *supra* note 23 at 896-897.

⁶⁴ J. Haas "Voluntary: Status and Protection under International Humanitarian Law" in *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges*, 191-213 (R. Arnold & P.A. Hildbrand eds., 2005); Sandoz, Swinarski, & Zimmermann, *supra* note 21.

practice, this fine line between voluntary and involuntary acts could be established and ascertained. Suggestions to work on the basis of a presumption of involuntary shielding may thus seem like a compromise solution.⁶⁵ However, they can only attenuate, but not overcome, the problem that, in times of war, attempting to assess the mental state of people without the control of the actor supposed to make that distinction is simply not feasible. A presumption of involuntary activity that actually merits being labelled a ‘presumption’ could only be overcome if voluntary shielding is shown, *i.e.*, only if all factors that could have rendered the activity involuntary can be excluded with some degree of certainty. This approach may work in theory, but whether such a presumption could ever realistically be overcome in practice is highly doubtful. Typically, and for most practical purposes, it seems that it would be extraordinarily difficult to find ‘reliable intelligence sources’⁶⁶ that could exclude all factors potentially rendering the shielding activity involuntary and to do so within the narrow period of time that is typically available prior to an attack. This raises the question why such a presumption – possibly combined with additional warning obligations that would add yet further complexity to an increasingly complex targeting process – should be introduced in the first place.

It is for these reasons that the authors argue that the distinction between voluntary and involuntary shielding – while not implausible as a matter of law – is not a sufficiently nuanced prism through which to establish direct participation in hostilities. The issue then becomes, naturally, what alternatives are open to better assess direct participation in hostilities while maintaining adequate protection of human shields under the law?

C. Objective Criteria as the Most Plausible Approach to Establish Direct Participation in Hostilities in Relation to Shielding Activities

In light of the problems caused by the application of the distinction set out in the previous subsection, it is necessary to examine whether there are any practicable alternatives. In this vein, the approach of the ICRC has been to adhere to the three (objective) constitutive elements developed in the Interpretive Guidance. The issue then becomes whether these criteria – in particular, the required threshold of harm and the requirement of direct causality – are fulfilled by a given shielding activity. With respect to the threshold of harm the ICRC distinguishes between human shields that create a ‘physical obstacle to military operations of a party to the conflict’ and human shields that create a legal obstacle, *i.e.*, human shields that

⁶⁵ Schmitt, *supra* note 35 at 336-337.

⁶⁶ See A. Rubinstein & Y. Ronzai, *supra* note 48, at 112.

manipulate the proportionality assessment in a way that an attack is prohibited due to the excessive civilian casualties it would cause.⁶⁷

In practice, it appears that the ICRC's distinction between physical and legal barriers to an attack in relation to human shielding has not (as yet, at least) found widespread support.⁶⁸ Nevertheless, the ICRC's reasoning shows that the crucial issue is often the determination of whether and when shielding activity meets the required threshold of harm. Consequently, the decisive question with respect to the threshold of harm is whether the shielding activity in question 'directly adversely affects the enemy's capability'.⁶⁹ It seems to us that this is the crux of the matter.

However, while the criterion of a threshold of harm is undoubtedly convincing and plausible, it is nevertheless the case that it is in itself the result of an interpretive exercise (as opposed to a requirement stipulated in the law). In other words, the defining criteria of this threshold are not written in stone, but rather remain subject to interpretation. The ICRC's approach of requiring a physical obstacle that objectively affects the adversary's military capabilities is plausible especially because it stipulates a criterion that is objectively verifiable. At the same time, it sets a relatively high threshold and excludes shielding activities that only adversely affect the adversary's willingness to attack. Of course, ascertaining whether shielding activity has indeed affected an adversary's willingness to attack will often be as difficult (and therefore impracticable) as the task of ascertaining whether a human shield is acting voluntarily or involuntarily (see above).

Nevertheless, it does not seem wholly implausible to argue that whenever a disincentive to attack is created, the relevant threshold of harm is met. In times of war a party to an armed conflict is required to operate swiftly and any obstacle – whether physical or motivational (such as fear of negative media coverage) – that impedes military operations could therefore be said to meet the (in any case undefined) threshold of harm. The problem with this approach, however, is that due to the practical difficulty inherent in verifying any such effect on the adversary's willingness to attack, it is extremely difficult to draw a clear line. And if the threshold of harm is indeed set so low, almost any shielding activity will meet this threshold and would amount to a direct participation in hostilities.

⁶⁷ *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, *supra* note 43 at 56.

⁶⁸ Dronova, *supra* note 56, at 42.

⁶⁹ See Melzer, *supra* note 59, at 22.

The paradoxical effect of such a low threshold of harm ('adverse effects on the attacker's willingness to attack') would be that shielding would no longer work. In other words, if shielding is – for all intents and purposes – to be equated with direct participation in hostilities, it would no longer be possible to manipulate the proportionality principle through the use of human shields in the first place. Further, and perhaps more crucially, accepting that adverse effects on the attacker's willingness to attack would suffice for a shielding activity to amount to direct participation in hostilities would – in our view – go too far in undermining civilian protection for the benefit of military considerations. In particular, it would mean that the more civilians are brought into the vicinity of a military objective, *i.e.*, the more clearly the attacker's willingness to attack will be adversely affected, the clearer the case that all such civilians would lose their protection from direct attack. This is clearly an undesirable outcome.

It seems to us that the suggested distinction between persons acting voluntarily or involuntarily as human shields is an attempt to strike a more adequate balance between civilian and military considerations. The suggested distinction, as a result, upholds a low threshold of harm while also introducing an additional subjective threshold whereby only adverse effects on an attacker's willingness to attack which were *caused voluntarily* would amount to direct participation in hostilities. Our argument is not that this 'package deal' which combines a low threshold of harm with an additional corrective threshold necessarily leads to an unacceptable balancing of interests. Rather, our criticism is that by introducing two different subjective elements at each end of the scale— on the one hand on the attacker's willingness to attack and, on the other hand, the human shield's volition, this approach relies on impracticable standards that are hard – if not impossible – to implement under battlefield conditions. Consequently, this approach creates additional legal uncertainty rather than bringing clarity and should, therefore, in our view, be rejected.

As such, we see no need to develop new and special criteria to assess whether human shielding amounts to a direct participation in hostilities. On the contrary, the assessment should indeed be based on the same criteria that are applied in all other circumstances in which civilian activities are qualified as a direct participation in hostilities. In turn this means that the relevant threshold of harm must necessarily be objectively established (including on the basis of circumstantial evidence) in order to determine whether a given shielding activity adversely affects the attacker's capability to attack.

IV. CONCLUSION

This article sought to examine the important issue of human shields – a phenomenon, which, as mentioned above, is arguably a more pressing issue today than ever before owing to the continued erosion of the distinction between civilian and military and the fact that traditional battlefields are increasingly replaced by hostilities in more complex, urban settings. This assessment of the use of human shields focussed in particular on a number of more contentious aspects of contemporary practice such as the issue of the relationship between permissible collocation, prohibited forms of collocation and the illegal use of human shields. It was shown that when determining whether a party to the conflict or individuals are in fact engaging in prohibited human shielding it is necessary to show that they had specific intent to shield. Under certain circumstances such intent can be inferred circumstantially. However, the mere fact that human shielding has occurred does not necessarily have any bearing on the legal protections of the civilians or other protected persons involved or on the legal obligations of the attacker. From a legal perspective, the only issue that matters in this regard is whether the shielding activity in question can be qualified as direct participation in hostilities leading to a temporary loss of protection from direct attack.

In this regard the authors rejected approaches advocating resort to subjective criteria to distinguish shielding activity amounting to direct participation in hostilities from shielding activity which leaves the legal protections of the civilians involved unaffected. While the law may be sufficiently open so as not to preclude resort to such subjective criteria – namely the voluntariness of the civilian involved in shielding activity and adverse impact on the attacker's willingness to attack in order to determine whether the requisite threshold of harm has been met – these criteria are extremely difficult if not impossible to ascertain under battlefield conditions. There may be numerous reasons why civilians are situated in the vicinity of military objectives (or *vice versa*) and their presence may affect the attacker's decision to attack in an equally large number of ways. To justify life and death decisions in such unclear circumstances, resort must be had to objectively verifiable criteria. Asymmetric warfare already challenges international humanitarian law principles in a number of ways and any approach that adds further legal uncertainty is a disservice to this legal order and will only serve to undermine rather than strengthen it.